

Minutes

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING

Tuesday, January 14, 2020

Location: 955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor, Jr. (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Dionna Maria Lewis (OEA Board Member), and Wynter Clarke (OEA Paralegal).

- I. **Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:20 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** – Patricia Hobson Wilson moved to adopt the Agenda. Peter Rosenstein seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The December 3, 2019 meeting minutes were reviewed. There were no corrections. The minutes were accepted.

V. **New Business**

A. **Public Comments on Petitions for Review**

1. There were no public comments offered.

B. **Summary of Cases**

1. **Keith Bickford v. Department of General Services, OEA Matter No. . 1601-0053-17** — Employee worked as a Supervisory Special Police Officer with the Department of General Services. Employee filed a Petition for Appeal with the Office of Employee Appeals on May 26, 2017. He argued that he was improperly removed from Agency because the proposal for removal was issued more than ninety business days after the agency became aware of the alleged misconduct; accordingly, Agency violated District Personnel Manual (“DPM”) § 1602.3(a). Therefore, Employee requested that he be reinstated to his position; that he receive back pay and benefits lost as a result of the termination; that the action be removed from his personnel file; and that he receive reimbursement of attorney’s fees.

Agency filed an Answer to the Petition for Appeal on June 30, 2017. It denied Employee’s allegations that the proposed removal was untimely. It argued that pursuant to DPM § 1602.3(c), it received a sixty-day extension of time to conduct its investigation. Additionally, Agency explained that Employee’s assertion of timeliness is undermined because he suffered no harm during the investigation. Accordingly, Agency requested that Employee’s appeal be dismissed.

Employee filed a Motion for Summary Disposition on November 30, 2017. He argued that Agency violated DPM § 1602.3 by failing to issue the notice of proposed removal within ninety business days from when Agency knew or should have known of his alleged misconduct. Agency filed its opposition on December 18, 2017. It contended

that the DPM regulations are directory, not mandatory. Additionally, it asserted that it did not violate the ninety-business day provision of DPM § 1602.3(a); thus, this cannot serve as a foundation for summary disposition.

On June 6, 2019, the AJ issued her Initial Decision. She determined that the issue was whether Agency violated DPM § 1602.3(a) by issuing its notice of proposed notice two days beyond the deadline pursuant to that provision. She reasoned that to answer that question, the first issue to be resolved was whether the word "shall" in DPM § 1602.3(a) is directory or mandatory. Ultimately, she held that the term "shall" is mandatory based on her analysis of the language of the regulation. Additionally, the AJ found that Agency was not entitled to an extension of the ninety-day deadline because it failed to submit its request within a timely manner. She determined that Agency failed to meet the mandatory requirement, absent good cause, for its delay in requesting the extension two days after the October 4, 2016 deadline. Furthermore, the AJ provided that Agency had sufficient information to issue the proposed notice in a timely manner. She explained that Agency represented that it began preparing the proposed notice of removal on October 3, 2016, one day before the deadline. Accordingly, she reversed Agency's adverse action and ordered that Employee be reinstated to her position and reimbursed all back pay and benefits.

On July 5, 2019, Agency filed its Petition for Review. It maintains that the ninety-day deadline in DPM § 1602.3(a) is directory. It asserts that DPM § 1602.3 has no penalty for non-compliance, and its failure to meet the deadline by two days does not provide a legal basis for reversal of its removal action because it was de minimus. Agency also argues that the AJ erred in determining that it was not entitled to an extension granted by DCHR. It contends that there is no language in DPM §1602.3(c) that requires that it submit a request for a suspension before the elapse of ninety days. Therefore, Agency requests that the Board grant its petition and reverse the Initial Decision.

Employee filed his response to Agency's Petition for Review on August 9, 2019. He argues that Agency's petition should be denied because the AJ correctly determined that the ninety-day rule provided in DPM § 1602.3 is mandatory. He argues that he does not need to show actual harm or prejudice cause by Agency's non-compliance of a mandatory deadline. Employee further contends that DPM § 1602.3(c) only permits DCHR to suspend the ninety-day deadline. However, it asserts that Agency should be prohibited from inappropriately attempting to extend the deadline retroactively. Accordingly, he requests that Agency's petition be denied.

- 2. Morris Yarborough v. Department of Public Works, OEA Matter No. J-0022-19–** Employee worked as a Sanitation Supervisor with the Department of Public Works. On December 27, 2018, Agency received and accepted Employee's resignation letter that was submitted on December 21, 2018. Subsequently, Employee rescinded his resignation. Agency declined Employee's request to rescind his resignation on the basis of an administrative disruption to the operation of Solid Waste Management Administration and Agency. Employee was placed on administrative leave; the effective date of his resignation was January 4, 2019.

On February 15, 2019, the OEA Administrative Judge requested that the parties submit legal briefs on the issue of jurisdiction. Agency filed its Answer to Employee's Petition for Appeal on March 13, 2019. It argued that pursuant to D.C. Official Code § 1-606.03(a), OEA does not have jurisdiction over this matter because Employee's

petition failed to provide any enumerated personnel actions listed in the rule. Furthermore, Agency asserted that it was not required to withdraw Employee's rescission since it did not affect the personnel actions under the aforementioned D.C. Official Code. Therefore, Agency requested that Employee's petition be denied.

The AJ issued his Initial Decision on May 16, 2019. He held that in accordance with District Personnel Manual Instruction Nos. 8-53, 36-3, and 38-12, Agency provided a valid rationale for rejecting Employee's request to withdraw his resignation before its effective date. The AJ also found that Agency was within its rights to accept Employee's resignation. Accordingly, the AJ ruled that OEA lacked jurisdiction and dismissed Employee's appeal.

On June 21, 2019, Employee filed a Petition for Review. Employee asserts that he was forced to resign. He also claims that management harassed, discriminated, and retaliated against him. Therefore, he requests that an amenable decision be rendered.

- 3. Lauren Manning v. D.C. Public Schools, OEA Matter No. J-0043-18**—Employee worked as a Bilingual Guidance Counselor for D.C. Public Schools. On February 23, 2018, Agency issued Employee a Final Notice of Termination based on charges of “intoxication while on duty” and “violation of the rules, regulations, or lawful orders of the Board of Education.” Specifically, Agency alleged that Employee violated its Mandatory Drug and Alcohol Testing Policy, which requires that employees occupying safety-sensitive positions submit to drug and alcohol testing upon reasonable suspicion of intoxication.

OEA received a copy of Employee's Petition for Appeal on April 17, 2018. In her appeal, Employee argued that she was not intoxicated at any point while on duty on February 22, 2018. She explained that she did not submit to the testing because she felt pressured to disclose private, clinically-diagnosed medical conditions for which she had legally prescribed medications. As a result, Employee believed that her termination was unlawful and requested to be reinstated with back pay, benefits, compensatory damages for emotional distress, and attorney's fees.

Agency filed its Answer on June 1, 2018. Included was a Motion to Dismiss for lack of jurisdiction. According to Agency, Employee's termination became effective on March 12, 2018, but she did not file an appeal with OEA until April 17, 2018. Agency reasoned that Employee's appeal violated OEA Rule 604.2 because it was filed more than thirty days after the effective date of her termination. Additionally, it contended that Employee's termination was taken for cause and requested that OEA conduct an evidentiary hearing on the merits if jurisdiction was established.

An Initial Decision was issued on July 3, 2018. The AJ held that OEA Rule 604.2 requires that appeals must be filed with OEA within thirty calendar days of the effective date of the appealed agency action. He noted that Agency provided Employee with the proper appeal rights to OEA, which included the requirement that an appeal must be filed within thirty days after the effective date of the termination action. Because the effective date of Employee's termination was March 12, 2018, and OEA did not receive Employee's Petition for Appeal until April 17, 2018, the AJ deemed her petition to be a violation of OEA Rule 604.2. To buttress his finding of lack of jurisdiction, the AJ reiterated that OEA Rule 621.3 may be invoked if a party fails to take reasonable steps to prosecute an appeal. Based on the record, he concluded that

Employee violated the rule by failing to submit a response to the May 21, 2018 Order on Jurisdiction. As a result, the AJ held that Employee’s failure to file a timely Petition for Appeal with OEA, in addition to her failure to respond to the May 21st order, served as grounds for dismissing the matter for lack of jurisdiction.

Employee, through counsel, filed a Motion to Reinstate Appeal with the OEA Board on April 19, 2019. Counsel explains that a paralegal from the law offices of Zipin, Amster & Greenberg, LLC sent, by certified mail, a cover letter and two copies of Employee’s Petition for Appeal to OEA on April 10, 2018. Counsel states that their law firm received a May 2, 2018 letter from OEA’s Executive Director indicating that Employee’s appeal was received. However, according to Employee’s counsel, neither the firm nor Employee received any further correspondence from OEA regarding the prosecution of her appeal. Counsel argues that Employee, through no fault of her own, has been denied an opportunity to appeal her termination before OEA. Therefore, counsel requests that Employee’s appeal be reinstated so that she may be permitted to prosecute her appeal on the merits.

C. Deliberations – After the summaries were provided, Peter Rosenstein moved that the meeting be closed for deliberations. Patricia Hobson Wilson seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor, Jr. stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

E. Final Votes – Clarence Labor, Jr. provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Keith Bickford v. Department of General Services

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

Five Board Members voted in favor of denying Agency’s Petition for Review. Therefore, the petition was denied. Accordingly, Agency was ordered to reinstate Employee and reimburse him all back pay and benefits lost as a result of his termination.

2. Morris Yarborough v. Department of Public Works

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis		X		

Five Board Members voted in favor of denying Employee’s Petition for Review. Therefore, the petition was denied.

3. Lauren Manning v. D.C. Public Schools

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.	X		X	
Patricia Hobson Wilson	X		X	
Jelani Freeman	X		X	
Peter Rosenstein	X		X	
Dionna Lewis	X		X	

Five Board Members voted in favor of granting Employee’s Motion for Reinstatement and remanding the matter to the Administrative Judge for further consideration. Therefore, the motion was granted and the case was remanded to the judge.

1. Public Comments– There were no public comments offered.

VI. Adjournment – Peter Rosenstein moved that the meeting be adjourned; Dionna Lewis seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 12:14 p.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**